Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

TAMMY E. NEIGHBOUR,

Petitioner,

v.

PATROLMAN MICHAEL COVERT; PATROLMAN JOSEPH KENNY and THE VILLAGE OF COOPERSTOWN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should *Kirby v. Illinois,* which states the rule that the right to counsel does not attach until adversary proceedings have been initiated, be overturned?

2. Should *Miranda v. Arizona* be extended to include all citizens under police interrogation, who are not in custody, but are asked incriminating questions?

3. Is the *Miranda* rule procedural or substantive?

4. Does public policy compel informing citizens of Sixth Amendment protection in police interrogations?

PARTIES TO PROCEEDINGS

Petitioner is Tammy E. Neighbour, a private citizen.

Respondents are Michael Covert and Joseph Kenny two policemen employed by the third Respondent, The Village of Cooperstown, New York.

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JURISDICTION

Jurisdiction in this case is premised upon 42 U.S.C. 1983, in that it seeks review by Writ of Certiorari of the decisions of the United States District Court, Northern District of New York, dated November 22, 1994 and the Court of Appeals for the Second Circuit dated October 27, 1995, denying redress under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

This petition is timely, pursuant to Supreme Court Rule 13.4, in that it was filed within 90 days of the Court of Appeals' decision affirming the decision of the District Court.

STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Constitution Amendment XIV (1868)

Section 1. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 42 U.S.C. Section 1983

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner seeks relief from this Court arguing, *inter alia*, that her right to counsel has been denied by two legal fictions: 1. the rule in *Kirby v. Illinois* which holds that a citizen in not entitled to counsel until, "adversary judicial proceedings have been initiated," and 2. by the interpretation of the *Miranda* rule by the district and appellate courts denying benefit of counsel to petitioner unless she was in "police custody."

A. THE FACTS MATERIAL TO THE QUESTIONS PRESENTED TO THIS COURT ARE:

Petitioner's personal property was taken out of her hands by the police without a warrant nor her permission; she was threatened and coerced into having other of her personal property brought to the police station without a warrant; she was taken into a small inner room at the police station, illegally seized of her person, and interrogated by two policeman, one of whom wore a gun

on his belt; she was ordered to fill-out police forms entitled "Voluntary Statement" and did not feel free to leave the station; she was not read her *Miranda* right to have a lawyer present, until after interrogation was completed; she was given no preliminary hearing by a district attorney, at which her counsel could have participated; her personal belongings were sequestered and held for months by the police without a warrant and without probable cause nor exigent circumstances; she was served with an information for petit larceny, arrested, fingerprinted and photographed; she was later found to be innocent of any crime and the charges against her were dismissed by the town court; she was denied recoupment of damages by the district and appellate courts on the theory that she had not suffered constitutional deprivation.

B. STATEMENT OF FACTS.

On September 30, 1993, two Cooperstown, N. Y. police officers entered petitioner's place of business, a bake shop, where she was employed as manager. One police officer was in full uniform, and wore a gun on his belt. The other officer was in civilian cloths. The officers did not have a search warrant.

They asked if she was Tammy Neighbour and if she owned a pair of leather boots. She produced them from under the counter. They were not in "plain view." One officer took the boots out of her hand, without her permission, and took them out of the shop to show them to a third person a few blocks away. He returned and said that that person could not identify them as stolen boots.

One officer said, "You are going to get one chance to return all the items that you stole, and if not, you are looking at two years in the state penitentiary."

The other officer said, "Now is the time to come clean."

On other threats that she would be driven home in a police car if she did not bring other personal goods to the station, petitioner called her sister and had her bring the items to the station.

Petitioner was then ordered to come to the police station immediately after closing the shop. She complied, although she did so against her will.

Upon entering the police station she was escorted to an inner room, measuring nine feet by twelve feet, where she was interrogated and was ordered to fill-in police forms entitled, "Voluntary Statement." She did so, also against her will.

She was then told she could leave the police station, and was about to exit the door, when she was told that her Miranda rights had to be read to her.

Upon leaving she called her attorney.

REASONS FOR GRANTING THE WRIT

I.

SHOULD *KIRBY v. ILLINOIS*, WHICH STATES THE RULE THAT THE RIGHT TO COUNSEL DOES NOT ATTACH UNTIL ADVERSARY PROCEEDINGS HAVE BEEN INITIATED, BE OVERTURNED?

A. FOUR DISTINGUISHED JUSTICES DISSENTED IN *KIRBY*.

B. *KIRBY* RUNS COUNTER TO *STARE DECISIS*.

C. THE CASES RELIED ON IN *KIRBY* DO NOT DIFFERENTIATE BETWEEN PRE- AND POST-INDICTMENT RIGHT TO COUNSEL.

D. STRICT CONSTRUCTION OF THE SIXTH AMENDMENT EXCLUDES THE *KIRBY* RULE.

A. FOUR DISTINGUISHED JUSTICES DISSENTED IN *KIRBY*.

The appellate court in the case at bar, concurred with the district court's finding that the right of counsel attaches only at or after adversary judicial proceedings begin, relying on *Kirby v. Illinois*, 406 U.S. 682 (1972).

> "[i]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him,"

The appellate court held that:

> "Since Neighbour had not been arrested or charged with any crime at the time of questioning, her Sixth Amendment rights had yet to attach."

Mr. Justice Brennan, (who was joined by Mr. Justice Douglas and Mr. Justice Marshall) in his dissenting opinion in *Kirby v. Illinois, supra,* said on p.696,

> "While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that Wade did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words 'criminal prosecutions' in the Sixth Amendment. Counsel is required at those confrontations because 'the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification.' *U.S. v. Wade,* 388 U.S. at 235.

Mr. Justice Brennan concludes, at p.697,

> "Hence, 'the initiation of adversary judicial criminal proceedings,' *Kirby v. Illinois,* at 689, is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial." (emphasis added.)

Mr. Justice White also dissented, saying, "*U.S. v. Wade,* 388 U.S. 218, and *Gilbert v. California,* 388 U.S. 263 govern this case and compel reversal of the judgment below."

B. *KIRBY* RUNS COUNTER TO *STARE DECISIS.*

Beginning with *Powell v. Alabama,* (1932) and going to *Wong Sun v. U.S.,* (1963) to *Pointer v. Texas,* (1965), to

Miranda v. Arizona, (1966) to *U.S. v. Wade,* (1967), *Gilbert v. California,* (1967) and to *Coleman v. Alabama,* (1970), the concept of the right to counsel at very early stages of criminal proceedings formed a strong basis of *stare decisis* in U. S. Supreme Court case law. (full citations given below)

It is respectfully submitted that Mr. Justice Stewart erroneously used *Powell v. Alabama,* 287 U.S. 32 (1932), to buttress his assumption that the right to counsel does not attach until adversary proceedings commence.

The language in *Powell* does not fix an exact moment in time for the right to counsel to attach. Rather, in sweeping language the Court acknowledges a need that counsel is "necessary . . . at every step in the proceedings." (Complete quotations and page references follow below.)

It is Justice Stewart who arbitrarily picked the moment in time as, "at or after the time that adversary judicial proceedings have been initiated" for the right to counsel to attach.

This runs counter to the embracing language in *Powell* where this Court said on page 68,

> " . . . notice and hearing are preliminary steps essential to the passing of an enforceable judgment . . . what, then, does a hearing include? . . . It has always included the right to the aid of counsel when desired and provided by the party asserting the right . . . (The accused) requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know

how to establish his innocence." (emphasis added)

This Court continued on page 72,

" . . . whatever may be the rule in other cases, the right to have counsel appointed, when necessary (emphasis added), is a logical corollary from the constitutional right to be heard by counsel."

Petitioner contends that during her interrogation it was necessary to have counsel present.

In *Wong Sun v. U.S.*, 371 U.S. 471 (1963), this Court held that statements made by a petitioner at the time of his unlawful arrest were the fruits of the agent's unlawful action, and they should have been excluded from evidence.

In *Pointer v. Texas*, 380 U.S. 400 (1965), petitioner was arrested and brought before a state judge for preliminary hearing on a robbery charge. The complaining witness testified but petitioner, who had no counsel, did not cross-examine. Petitioner was later indicted and tried. The witness had moved to another State and the transcript of his testimony at the hearing was introduced over petitioner's objections that he was denied the right of confrontation. This Court held that the introduction of the transcript in a federal criminal case would have been a clear denial of the right of confrontation under the Sixth Amendment, since the statement was made without an adequate opportunity for cross-examination.

Powell was relied on in *U.S. v. Wade*, 388 U.S. 218 (1966) in which this Court said, on page 227,

> "In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

This Court also said on page 226,

> It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. (emphasis added)

This Court in *Miranda v. Arizona*, 384 U.S. 436, said,

> "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today."

It is respectfully submitted that the rule in *Kirby* runs counter to the above cases which form *stare decisis* as to the right to counsel.

C. THE CASES RELIED ON IN *KIRBY* DID NOT DIFFERENTIATE BETWEEN PRE AND POST-INDICTMENT RIGHT TO COUNSEL.

Mr. Justice Stewart relies on the following cases in *Kirby*, page 689,

> "In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell v. Alabama, supra; Johnson v. Zerbst*, 304 U.S. 458; *Hamilton v. Alabama*, 368 U.S. 52; *Gideon v. Wainwright*, 372 U.S. 335; *White v. Maryland*, 373 U.S. 59; *Massiah v. United States*, 377 U.S. 210; *United States v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263; *Coleman v. Alabama*, 399 U.S. 1.

Contrary to Mr. Justice Stewart's assertion, none of these cases state that the "right to counsel attaches ONLY at or after the time that adversary judicial proceedings have been initiated." (emphasis added) None of these cases say the right to counsel cannot attach BEFORE the time that adversary proceedings have been initiated. In none of these cases did this Court differentiate between pre-indictment and post-indictment right to counsel. All of these cases merely assert the right to counsel at indictments or at trials.

The issues in these cases are as follows: *Powell v. Alabama* (not sufficient time to obtain, or for the court to appoint, counsel); *Johnson v. Zerbst* (defendant convicted and sentenced without counsel); *Hamilton v. Alabama*

(absence of counsel at time of arraignment violated defendants rights of due process); *Gideon v. Wainwright* (defendant was entitled to counsel in a non-capital state case); *White v. Maryland* (absence of counsel for petitioner when he entered guilty plea before the magistrate violated his right of due process); *Massiah v. United States* (statements overheard by federal agents are not admissible without notice to defendant's attorney who had already been retained); *United States v. Wade* (counsel at a pretrial line-up is necessary if line-up created a "critical confrontation"); *Gilbert v. California* (in-court identifications must first be determined if they were not tainted by illegal line-up procedures); *Coleman v. Alabama* (petitioners had a right to counsel at the preliminary hearing because the Sixth Amendment establishes a right to counsel "in all criminal prosecutions").

It is submitted that the concept that the right to counsel attaches only after adversary proceeding have begun, has no case law authority, but is merely a concept conceived by Mr. Justice Stewart, or by the majority of the court in a single case: *Kirby.*

D. STRICT CONSTRUCTION OF THE SIXTH AMENDMENT EXCLUDES THE *KIRBY* RULE.

There is nothing in the Constitution which indicates that the framer's meant for the Sixth Amendment to apply "only after the onset of formal prosecutorial proceedings." *Kirby, supra,* p. 690.

In *Kirby*, Mr. Justice Stewart said on p. 690,

> "In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings."

Petitioner respectfully suggests that there is nothing in the Constitution which makes the "absolute constitutional guarantee" of the Sixth Amendment "historically and rationally applicable only after the onset of formal prosecutorial proceedings." To the contrary, as pointed out above, *Powell, Wong Sun, Pointer, Coleman, Miranda, Wade,* and *Gilbert* state that the right to counsel applies in informal proceedings, which include police interrogation.

Rather than the *Kirby* rule, the petitioner urges this Court to adopt the view that: If police interrogate a citizen whose answers can later be used against him in a criminal trial, then the citizen must be advised of his right to have an attorney present during interrogation.

Such interrogation, it is submitted, without the presence of an attorney, becomes a "critical confrontation" as defined in *U.S. v. Wade,* 388 U.S. 218, headnote 2.

> "The Sixth Amendment guarantees an accused the right to counsel not only at his trial but at any critical confrontation by the prosecution at pretrial proceedings where the results might well determine his fate and where the absence of counsel might derogate from his right to a fair trial."

Petitioner respectfully points out that the right to counsel at such a police interrogation has always existed

implicitly in the Constitution, but was never quite spelled-out by this Court until *Miranda*.

This Court in *Miranda v. Arizona, supra,* recognized a violation of the Fifth Amendment in answering questions put by the police without an attorney present, but the Fifth Amendment right was shown by this Court to be inextricably tied to the Sixth Amendment, saying on p.470,

> "Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." (emphasis added)

In considering Ms. Neighbour's request for counsel, one is reminded of Clarence Earl Gideon, who basically said, "The Constitution says that I am entitled to have an attorney represent me at trial."

So too does Tammy Neighbour say, "The Constitution says that I am entitled to an attorney in a 'criminal prosecution' which includes police interrogation, where such interrogation elicits incriminating testimony."

II.

PETITIONER WAS IN CUSTODY AND UNDER ARREST IN THE POLICE STATION.

It is submitted that the district and appellate courts erred in concluding that petitioner was not in police custody nor under arrest at the police station, and that her Fourth Amendment rights had not been violated.

Petitioner was taken into an inner room at the police station measuring 9 feet by 12 feet, and was accompanied by two police officers, one of whom was in complete uniform, wearing a revolver on his belt. Coercive language had been used by the officers, and acknowledged by the district court in his decision, included a statement by defendant Kenny, "You are going to get one chance to return all the items that you stole, and if not, you are looking at two years in the state penitentiary." Defendant Covert added, "Now is the time for you to come clean." (Paragraphs 17 and 18, Petitioner's Complaint)

Petitioner was also coerced into calling her sister to have her bring personal possessions of horse tack to the police station, with Defendant Kenny threatening, "I can get a search warrant in two minutes. I want to take you down to your house in the police car and have you give us the three items which belong to the Chamberlains." (Par. 27, Petitioner's Complaint)

These horse tack items were permanently retained by the police after being brought down to the police station.

These facts fulfill 5 of the 6 criteria set down in *U. S. v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990) and cited in the decision of the appellate court, to indicate seizure of a person:

> (the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room.)

Petitioner not only maintained in her Complaint that she was in police custody while at the Cooperstown police station, but that she was under arrest while in the inner room at the police station, under the surveillance of two police officers.

In *Commonwealth of Pennsylvania v. Brown*, 326 A.2d 906, in headnotes 1 and 2, it is pointed out that:

> "It has long been the law that an officer may arrest a person without manual or forcible restraint. Thus our Supreme Court has stated:
>
> 'It will not be seriously contended that, to constitute an arrest, there must be an application of actual force, or manual touching of the body, or such physical restraint as to be visible to the eye. Such is not the law. All the authorities agree an arrest may be made either with or without a manual or actual touching, by the officer.' " *McAleer v. Good*, 216 Pa. 473, 475 (1907)
>
> "All that is required is some act by the officer which indicates his intention to detain or to take a person into custody, thereby subjecting that person to the actual control and will of the officer. No formal declaration of arrest is required." See 5 Am. Jur.2nd Arrest Sec. 1 (1962)

Petitioner contends that the district and appellate courts were in error in not finding that she was in custody and under arrest.

III.

SHOULD *MIRANDA* BE EXTENDED TO INCLUDE ALL CITIZENS UNDER POLICE INTERROGATION,WHO ARE NOT IN CUSTODY, BUT WHO ARE ASKED INCRIMINATING QUESTIONS?

This Court in *Miranda v. Arizona, supra,* recognized a violation of the Fifth Amendment in answering questions put by the police without an attorney present, but the Fifth Amendment right was shown by this Court to be inextricably tied to the Sixth Amendment, saying on p.471,

> "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today."

This Court continued on p. 474,

> "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."

In these two paragraphs, nothing is mentioned about the necessity to be "in custody" or "under arrest" or "indicted" or "arraigned." Standing alone, these paragraphs would tend to indicate the proclivity of the court to hold that a citizen has a constitutional need to have a lawyer present at all police interrogations. Of course,

Miranda had been arrested and was in police custody at the time of his confession, but he had not been indicted nor arraigned.

While it is the position of petitioner that she was in police custody, this Court is respectfully urged to apply these concepts to the petitioner, even if this Court finds that petitioner was not in custody.

IV.

IS THE *MIRANDA* RULE PROCEDURAL OR SUBSTANTIVE?

The district court held on p. A24 of its Decision and Order that,

> "Requirement to notify a person of their *Miranda* rights is a judicial device to protect the Fourth (sic) Amendment Rights against self-incrimination and it is not a constitutional right in and of itself."

The appellate court held on p. 225 of its decision that,

> "*Miranda* warnings are a procedural safeguard rather than a right explicitly stated in the Fifth Amendment." See *Miranda v. Arizona,* 384 U.S. 436, 467 (1966)

Petitioner contends that the district and appellate courts overlooked the fact that the *Miranda* warnings also contain notice that the suspect has a constitutional Sixth Amendment right to an attorney, and that the suspect should be so informed prior to interrogation.

It is submitted that the lower courts focused solely on the Fifth Amendment aspect of *Miranda,* and not the legal

basis for excluding evidence, i.e., the failure to provide the Sixth Amendment right to the accused, which in turn triggered the Fifth Amendment right against self-incrimination.

Petitioner submits that it is illogical to hold that a warning which says, "You have the constitutional right to have an attorney present," should be considered merely procedural and not substantive.

Petitioner urges this Court to hold that the *Miranda* rule is substantive in nature, because it informs citizens of their constitutional rights, and the *Miranda* warnings should be read to any citizen being interrogated by police, if such interrogation elicits incriminating testimony.

V.

DEFENDANT VILLAGE IS LIABLE UNDER SECTION 1983.

The Chief of Police of Cooperstown, New York stated in his deposition that the town did not have a policy nor a program for training its police officers, but relied solely on what the officers learned at police school. (See deposition of Michael Crippen, pages 3 through 8)

By this lack of "policy or custom" to train its police officers the town evidenced a "deliberate indifference" to the rights of its inhabitants. *Canton v. Harris,* 489 U.S. 378, 389 (1989)

It is more than a mere allegation that the town failed to train its employees properly. Petitioner has maintained that the police: 1. failed to establish that petitioner had borrowed the horse tack for which she was served an information, and for which she was arrested, fingerprinted and photographed. (See Transcript of Proceedings

of the District Court pages 139 to 143, the crossexamination of Mrs. Chamberlain); 2. failed to read petitioner her *Miranda* rights in a timely fashion; 3. used threatening and coercive language to petitioner to obtain personal belongings from petitioner's home without a search warrant; 4. taking petitioner's boots out of her hand in her place of business without permission and without a search warrant; and 5. failing to tell petitioner that she had the constitutional right to have an attorney present during police interrogation, but only informed her of this right by reading her *Miranda* rights to her after interrogation.

VI.

DOES PUBLIC POLICY COMPEL INFORMING CITIZENS OF SIXTH AMENDMENT PROTECTION IN POLICE INTERROGATIONS?

Each day in the United States, thousands of citizens are either asked or told by police to come to a police station to answer questions.

Most citizens, probably the great majority, are not aware that they can refuse to appear at a police station without first being served a warrant, and if they do appear they can have their attorney with them.

The *Kirby* rule allows police, to have a free hand in not only questioning the citizen, but also controlling the circumstances under which the questioning takes place without the interference of the citizen's lawyer. Such a privilege could not be granted unilaterally to a district attorney, without giving the citizen's attorney the right to also question his client. Often, as in the case at bar, this

also includes taking physical control of petitioner which amounted to an arrest.

Petitioner is a typical law abiding citizen, who in her thirty years, had never had a confrontation with the police, not even to the extent of ever receiving a traffic ticket.

She was ordered to come to the police station and reported there as told to do. She was frightened. She was taken into an inner room, interrogated without being informed that she could have had her lawyer present, and ordered to fill-out printed police forms entitled "Voluntary Statement". In spite of the fact that Ernesto Miranda was questioned under exactly the same circumstances, and told to fill-out police forms, the district court found that petitioner had consented to go to the police station, and was not in police custody, and was not under arrest, even though she did not feel free to leave." *U.S. v. Lee*, 916 F.2d 814 (2d Cir. 1990)

There was no preliminary hearing, as such, with district attorney and counsel present. Petitioner was accused of a misdemeanor, petit larceny, by the police. Basically, the "preliminary hearing" was conducted by the police at the police station, where petitioner was not informed of her right to have an attorney present until she was at the door ready to leave the station after interrogation. The very next morning, based solely on legal conclusions of guilt made by the defendant Cooperstown police officers, the case was sent to the state police, a few miles away, to have petitioner served with an information, and to have her arrested, fingerprinted and photographed.

The district court in the case at bar, also found that "legal counsel was readily available which plaintiff chose not to avail herself." (p. A21 Decision and Order).

This Court in *Miranda*, quoting *People v. Dorado*, 62 Cal. 2d 338, 351 (1965) said on p. 471,

> "An individual need not make a pre-interrogation request for a lawyer . . . The accused who does not know his rights and therefor does not make a request may be the person who most needs counsel.
>
> "To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it."

If protection of a citizen's rights is left solely to *Kirby*, it is strictly a matter of chance as to whether or not a citizen has an attorney present when interrogated at a police station. The majority of citizens, unaware of their rights, can be doomed, as in petitioner's case, to experience the trauma and public destruction of their reputations, from the time the police adjudge them guilty, and until they prove their innocence.

In *Kirby*, Mr. Justice Stewart said on p. 690,

> "In this case we are asked to import into a **routine police investigation** an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings." (emphasis added)

But when does a "routine police investigation" become a "critical confrontation" requiring the presence of counsel? One is reminded of the economic definitions of "recession" and of "depression". If *you* are out of work,

it is a recession, but if *I* am out of work it is a depression. (Excuse the implicit levity.)

Petitioner maintains that if the police ask my neighbors questions, it is a routine investigation, but if I am asked questions which can incriminate me, it is a "critical confrontation" at which my lawyer must be present.

The petitioner argues against form and in favor of substance, and contends that a pre-trial, pre-information interrogational confrontation with police, is substantive and thus protected by our Constitution.

The pre-trial, police station interrogation can often produce a long lasting negative impact on the lives of innocent citizens who are merely "suspected" of a crime by the police. The interrogation of petitioner produced catastrophic effects on her life far out of proportion to her being erroneously charged with petit larceny. They took place simply because of a "hunch" of the Cooperstown police that she was guilty of stealing less than fifty dollars worth of horse tack. The presence of counsel could have been prevented an unfortunate chain of events, by asking for a few weeks to produce proof of ownership in the tack, which proof was ultimately produced.

Instead, solely upon the judgment of the two poorly trained defendant policemen, petitioner was arrested, fingerprinted, and photographed. The local newspaper printed a story about her arrest. She was humiliated and her reputation adversely affected in her "small town" community. Her eight year old son's schoolmates shouted that his mother was a thief. The boy was forced to leave his mother to live with his father, a divorced alcoholic. Petitioner had trouble finding employment. Without her

own horse tack, which had been sent to and held by the state police after being marked as stolen goods by the inept defendant police, she lost her standing of first place in New York state horse competition, and lost her chance to win $50,000 in cash and prizes. The trauma of this entire experience produced insomnia and loss of weight, and compelled her to submit to a doctor's care.

Petitioner maintains that, despite the district court's finding to the contrary, she did in fact suffer constitutional deprivations under the Fourth, Sixth, and Fourteenth Amendments, which is actionable under 42 U.S.C. Section 1983 since petitioner can prove damages flowing from the constitutional deprivations.

It should be noted that the police did not see fit to read petitioner her *Miranda* rights until she had her hand on the doorknob, ready to exit the police station. The defendant police officer, who then "remembered" to read the rights is a veteran of the force for 26 years. Since the district court denied the petitioner's allegations that the police were not adequately trained, the only logical alternative is to conclude that petitioner was purposely interrogated without being told that she had a right to have her lawyer present.

The Court in Miranda warned of illegal third degree police tactics, saying on p.449,

> "The officers are told by the manuals that the 'principle psychological factor contributing to a successful interrogation is *privacy* – being alone with the person under interrogation.' (Inbau & Reid, Criminal Interrogation and Confessions, 1962). The efficacy of this tactic has been explained as follows: 'If at all practicable, the

> interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home.' " O'Hara, Fundamentals of Criminal Investigation (1956).

In conclusion, the petitioner contends that in order to guarantee every citizen's constitutional rights, police should be obliged, as a matter of public policy to inform each citizen of his or her right to have an attorney present during police interrogation, if the citizen's testimony can later be used to incriminate him or her.

Under the law, as it stands today the combination of the *Kirby* rule which says that petitioner is not entitled to an attorney until adversary proceedings have been formally commenced, and the *Miranda* rule which the district and appellate courts interpreted as not applicable to petitioner because she was not in police custody – leaves the petitioner defenseless against the coercion and intimidation of the police who are free to use tactics close to third degree methods.

Petitioner urges this Court to adopt a view that police interrogation involving incriminating testimony constitutes "criminal prosecution" under the Sixth Amendment.

CONCLUSION

For the above reasons Petitioner requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 63 – August Term, 1995

(Argued: September 22, 1995

Decided: October 27, 1995)

Docket No. 94-9312

TAMMY E. NEIGHBOUR,

Plaintiff-Appellant,

–v.–

PATROLMAN MICHAEL COVERT; PATROLMAN JOSEPH KENNY and THE VILLAGE OF COOPERSTOWN,

Defendants-Appellees.

Before:

OAKES, MINER and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York (Hurd, Magistrate J.), entered after a bench trial, dismissing appellant's complaint in a civil rights action, the district court having determined, *inter alia,* that failure of police officers to give *Miranda* warnings is not actionable.

Affirmed.

GILBERT DILUCIA, Law Offices of Gilbert DiLucia, Cooperstown, NY, *for Plaintiff-Appellant.*

JOHN T. CASEY, Bohl, Dellarocca & Dorfman, Albany, NY (Joseph Muia, Jr., of counsel) *for Defendants-Appellees.*

PER CURIAM:

Appellant Tammy E. Neighbour appeals from a judgment of the United States District Court for the Northern District of New York (Hurd, Magistrate J.), entered after a bench trial, dismissing appellant's complaint in a civil rights action, the district court having determined, *inter alia*, that failure of police officers to give *Miranda* warnings is not actionable.

BACKGROUND

On September 30, 1993, appellees Officers Michael Covert and Joseph Kenny ("the officers"), two members of the Cooperstown Police Department, went to the store where Neighbour was employed to question her about property that they believed she had stolen. Upon entering the store, the officers advised Neighbour that they were investigating the theft of certain articles of equipment known as horse tack. The officers proceeded to question Neighbour, and requested that she give them her boots so that they could determine whether the boots had been stolen. In an attempt to gain Neighbour's cooperation, the officers warned her of the possibility of spending two years in the state penitentiary. Neighbour responded by

giving the boots to the officers, who then determined that the boots were not stolen property and returned them to her. However, the officers requested that Neighbour come to the police station later that day and that she bring the other allegedly stolen property with her.

After finishing work for the day, Neighbour went to the police station as requested by the officers. The other property allegedly stolen, the items of horse tack, was brought to the police station by Neighbour's sister. At the station, Neighbour signed a statement regarding the manner in which she had acquired the property. Shortly thereafter, Officer Kenny read Neighbour her *Miranda* rights, and Neighbour then left the station. The officers, however, retained the items brought to the station. The property later was delivered to the New York State Police, which took over the investigation. Neighbour subsequently was charged with petit larceny. These charges eventually were dismissed.

Neighbour brought an action against the officers and the Village of Cooperstown, pursuant to 42 U.S.C. §§ 1983, 1985(2), and 1986, claiming that the officers violated her Fourth, Sixth, and Fourteenth Amendment rights, and that the Village of Cooperstown was liable for having failed to train the officers properly. Following a two-day bench trial, the district court read into the record its findings of fact and conclusions of law. The district court dismissed Neighbour's complaint, finding that the officers' failure to read Neighbour the *Miranda* warnings was not actionable under § 1983, Neighbour's Fourth Amendment rights had not been violated, Neighbour's Sixth Amendment right to counsel had not attached, the

officers were entitled to qualified immunity, and the Village of Cooperstown was not liable because Neighbour's constitutional rights had not been violated.

With respect to the *Miranda* warnings, the district court stated in its findings of fact that Neighbour "was not in custody while she voluntarily answered questions at the police station." However, the district court, in its conclusions of law, stated that "[d]efendants did not read [Neighbour] her *Miranda* rights prior to questioning but the issue is not whether or not her statement is admissible at [a criminal] trial, it was not." The court then advised the officers that "it is this court's opinion that this statement by [Neighbour] would never have been admissible in a criminal proceeding and it is this Court's suggestion that your interrogation procedures should be adjusted accordingly."

DISCUSSION

1. Miranda Violation

Neighbour contends that the officers are liable under § 1983 for failing to give her the *Miranda* warnings prior to questioning her at the store and at the police station.[1]

---

[1] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

It is well-settled that *Miranda* warnings are not required when an individual is not in custody. *See Beckwith v. United States*, 425 U.S. 341, 345-46 (1976). Although the district court in the present case found that Neighbour never was in custody, it nevertheless concluded that her *Miranda* rights had been violated. However, this seeming inconsistency is of no consequence in this case, since we hold that the failure to give Miranda warnings does not create liability under § 1983.

Miranda warnings are a procedural safeguard rather than a right explicitly stated in the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The remedy for a *Miranda* violation is the exclusion from evidence of any ensuing self-incriminating statements. *See New York v. Quarles*, 467 U.S. 649, 663 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part). The remedy is not a § 1983 action. *Lucero v. Gunter*, 17 F.3d 1347, 1350-51 (10th Cir.1994); *Brock v. Logan County Sheriff's Dep't*, 3 F.3d 1215, 1217 (8th Cir.1993); *Cooper v. Dupnik*, 963 F.2d 1220, 1243 (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 407 (1992); *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir.), *cert. denied*, 490 U.S. 1091 (1989). Therefore, even if we were to assume that Neighbour's *Miranda* rights had been violated, that violation, standing alone, would not form a basis for liability under § 1983.

2. *Fourth Amendment Claim*

Neighbour contends that her encounters with the officers at the store and the police station constituted an unreasonable seizure of her person, in violation of the Fourth Amendment. The Fourth Amendment guarantees

"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." An individual is seized by the police "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Lee*, 916 F.2d 814, 819 (2d Cir.1990) (internal quotations omitted); *see also Gardiner v. Incorporated Village of Endicott*, 50 F.3d 151, 155 (2d Cir.1995). Under this objective test, we must examine "the overall coercive effect of the police conduct." *Id.* In *Lee*, we identified several factors that might suggest that a seizure has occurred, including:

> the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room.

Id.

In the present case, only two police officers approached Neighbour at the store, and neither made a show of force. They did not physically touch Neighbour or limit her freedom in any way. Furthermore, they did not ask Neighbour to accompany them to the police station, but rather requested that she come to the station later that day by herself. Finally, the district court found that Neighbour voluntarily went to the police station, and that she was not in custody at the store or at the police station. Under the circumstances revealed, we do not

think that Neighbour's encounters with the officers amounted to a seizure under the Fourth Amendment.

Neighbour also claims that the officers violated her Fourth Amendment rights by illegally searching and seizing her property. She contends that the district court erred in finding that she had consented to the seizure, and therefore that her Fourth Amendment rights were not violated. However, the district court found that the officers did not search Neighbour at the store, and that she voluntarily gave her boots and other property to them. These findings are supported by the record and we do not find them to be clearly erroneous.

3. Sixth Amendment Claim

Neighbour further argues that her Sixth Amendment right to counsel was violated when the officers questioned her prior to giving her the *Miranda* warnings. However, "[i]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Since Neighbour had not been arrested or charged with any crime at the time of questioning, her Sixth Amendment rights had yet to attach. Accordingly, the district court properly determined that Neighbour's Sixth Amendment rights had not been violated.

4. Claim Against the Village

Neighbour claims that the district court erred in determining that the Village of Cooperstown is not liable under § 1983. In order to maintain a § 1983 action against a municipality for the conduct of employees below the policy-making level, a plaintiff must demonstrate that "the violation of his constitutional rights resulted from a municipal custom or policy." *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 122 (2d Cir.1991). "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Canton v. Harris*, 489 U.S. 378, 389 (1989). The mere allegation that the municipality failed to train its employees properly is insufficient to establish a municipal custom or policy. *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir.1993). In this case, there was nothing in the record beyond the allegation that the Cooperstown Police Department failed to train its employees properly. In any event, Neighbour failed to establish any constitutional violation by the officers, and therefore cannot recover on her claim against the Village of Cooperstown. *See Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

CONCLUSION

In view of the foregoing, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TAMMY E. NEIGHBOUR

Plaintiff,

-against-

PATROLMAN MICHAEL COVERT; PATROLMAN JOSEPH KENNY; THE VILLAGE OF COOPERSTOWN.

Defendants.

93-CV-1452

COMPLAINT

JURY TRIAL DEMANDED

(Filed Nov. 17, 1993)

JURISDICTION AND VENUE

1. Plaintiff brings this action pursuant to 42 U.S.C. 1983, 1985(2) and 1986 to redress violations of his rights under the Fourth, Sixth and Fourteenth Amendments to the United States Constitution. The violations occurred while plaintiff was at work at her place of business in Cooperstown, N. Y., and at the Police Headquarters in Cooperstown, N. Y.

2. This court has jurisdiction pursuant to 28 U.S.C. 1331, and 1343 (3) and (4).

3. Venue in this court is premised upon 28 U.S.C. 1391 (b) in that plaintiff's claims arose within the Northern District of New York.

PARTIES

4. Plaintiff Tammy E. Neighbour, at all relevant times, was a resident of Middlefield Center, N. Y. and

employed in Cooperstown, N. Y., both locations being in Otsego County in the State of New York.

5. Patrolmen Michael Covert and Joseph Kenny, at all relevant times, were employed by the Cooperstown Police Department.

FACTUAL ALLEGATIONS

6. On September 30, 1993, at approximately 4:30 P. M., two uniformed Cooperstown police officers, Michael Covert and Joseph Kenny entered the Sweet Indulgence Pastry Shop in Cooperstown in which plaintiff is employed as manager.

7. They asked if plaintiff was Tammy Neighbour, to which plaintiff answered in the affirmative.

8. Patrolman Covert said that they "needed" plaintiff to go down with them to the police station.

9. Plaintiff asked for what reason, and the police officers said that they could not discuss the matter in the shop.

10. Plaintiff said she could not leave until she closed the shop at 6 P. M.

11. They then said that they would discuss the matter at the shop, but that Officer Kenny would have to go to the police station to get a file.

12. Officer Kenny left, and returned in a few minutes with a file, while Officer Covert remained in the shop with plaintiff.

13. Officer Covert told plaintiff, "I must question you because Wynn Hovey's house has been robbed and you have access to the key to the back door of her house."

14. Plaintiff responded that Mrs. Hovey runs a Bed and Breakfast and many people including the garbage man, the chambermaid, and other past employees have access to this key, and know its location.

15. This key is hung in open view in the garbage shed.

16. Officer Covert asked plaintiff if she had any items belonging to Mrs. Hovey, to which plaintiff responded in the negative.

17. Officer Kenny then said, "You are going to get one chance to return all the items that you stole, and if not, you are looking at two years in the state penitentiary."

18. Officer Covert said, "Now is the time for you to come clean."

19. Plaintiff was petrified, and in terror at the threats from these uniformed police officers.

20. Officer Covert asked, "Do you own a pair of leather boots?" to which plaintiff replied in the affirmative.

21. "Where are they?", Officer Covert asked.

22. Plaintiff said they were behind the counter. She picked them up and showed them to the police officers. They were not in "plain view".

23. Officer Kenny took them from her and said, "I am going to take them over the Mrs. Hovey and ask her to identify them."

24. Officer Kenny left the shop with the boots, returning several minutes later.

25. Upon re-entering the ship, Officer Kenny said to Officer Covert, "Nope, no good."

26. Plaintiff asked what Mrs. Hovey had said. Officer Kenny responded, "She said they looked familiar, but she was not sure they were her daughter's."

27. Officer Kenny then threatened, "I can get a search warrant in two minutes. I want to take you down to your house in the police car and have you give us the three items which belong to the Chamberlains." (former employers of plaintiff.)

28. The three items referred to by Officer Kenny were one saddle rack (worth about $8 dollars); a tack hook (worth about $2 dollars); and a saddle twitch (worth about $3 dollars). They had been attached to a $1,200 dollar saddle which the Chamberlains had lent to plaintiff to use during the horse show season (the four weeks in August).

29. Plaintiff had returned the saddle to its owners during the first week in September when she happened to have it in her car, but the three saddle attachments were still in plaintiff's horse trailer, with the knowledge and consent of the Chamberlains.

30. It was approaching 6 P.M. Officer Covert instructed plaintiff to come down to the police station immediately after plaintiff closed the shop.

31. When they left the shop, plaintiff telephoned her sister Jamie Tirbs who is seventeen years of age.

32. Plaintiff told her to bring all the tack equipment from the horse trailer to the police station, immediately, because the police had told plaintiff they were going to take plaintiff home in a police car to get it.

33. Plaintiff told her sister that she did not want to be embarrassed by arriving at her house in a cop's car, which would attract the attention of their neighbors.

34. Plaintiff closed the shop, and immediately drove down to police headquarters, following the police instructions.

35. As plaintiff entered the police station, Officer Covert said. "I need you to write down everything that we talked about. Sit down here and write it."

36. Officer Covert placed a sheet of paper in front of plaintiff, entitled "voluntary statement".

37. Against her will, plaintiff wrote a statement.

38. Plaintiff felt that she was under arrest, and if she did not do as she was told, she would not be able to leave the police station.

39. Plaintiff's sister, Jamie Tirbs, arrived at the police station around 6:30 P. M. with horse tack equipment belonging to them both.

40. Officer Covert made a list of all the equipment on his computer, and asked plaintiff to sign it.

41. Then Officer Covert said that plaintiff could leave.

42. Officer Kenny said, "Oh, wait a minute, I have to read you your rights."

43. Officer Kenny then read plaintiff a Miranda statement which said that plaintiff had a right to remain silent, and that she had the right to consult an attorney.

44. Plaintiff then walked out the door of the police station.

45. Plaintiff is thirty years of age, and has never been arrested nor in police custody until this incident occurred.

46. Plaintiff's sister, Jamie Tirbs, is seventeen years of age.

47. Upon information and belief, one Jerry Diorio, plaintiff's former employer, was told by the defendant police officers that plaintiff was a cleptomaniac [sic] and that she needed psychiatric help.

48. On information and belief, Mrs. Barbara Chamberlain, plaintiff's former employer, was told by the defendant police officers to come to the police station and choose her belongings from a group of stolen horse tack equipment.

FIRST CAUSE OF ACTION

49. Paragraphs 1 through 48 are repeated and realleged as though fully set forth herein.

50. The defendants, Officer Michael Covert and Officer Joseph Kenney, violated plaintiff's rights under the Fourth Amendment to the United States Constitution,

to wit, to be secure in her person and effects, by unreasonably searching the plaintiff without a search warrant, and without probably cause, by illegally seizing plaintiff's personal property in her place of business and at the police station without a warrant or court order, causing plaintiff deep mental anguish.

SECOND CAUSE OF ACTION

51. Paragraphs 1 through 50 are repeated and realleged as though fully set forth herein.

52. The defendants Covert and Kenny violated plaintiff's rights under the Fourth Amendment, without a warrant, and without probable cause, by compelling her by the use of threats, to produce certain personal possessions at the police station, confiscating and detaining them, against the will of plaintiff.

THIRD CAUSE OF ACTION

53. Paragraphs 1 through 52 are repeated and realleged as though fully set forth herein.

54. The defendants Covert and Kenny violated plaintiff's rights under the Sixth Amendment to the United States Constitution by failing to advise plaintiff of her right to counsel in a timely manner, thus depriving her of the advice of counsel while she was under arrest and custody both at her place of business and at the police station.

FOURTH CAUSE OF ACTION

55. Paragraphs 1 through 54 are repeated and realleged as though fully set forth herein.

56. The defendants Covert and Kenny violated plaintiff's rights under the Sixth Amendment to the United States Constitution by illegally restraining the person of the plaintiff, by placing her under arrest and custody in her place of business and at the police station without a warrant or court order, and without probable cause.

FIFTH CAUSE OF ACTION

57. Paragraphs 1 through 56 are repeated and realleged as though fully set forth herein.

58. The defendants Covert and Kenny violated plaintiff's rights under the Fourteenth Amendment to the United States Constitution by depriving her of her liberty both at her place of business and at the police station.

SIXTH CAUSE OF ACTION

59. Paragraphs 1 through 58 are repeated and realleged as though fully set forth herein.

60. The defendants Covert and Kenny violated plaintiff's rights under the Fourteenth Amendment to the United States Constitution by depriving plaintiff of her property without due process of law, by taking plaintiff's personal property from her at her place of business without a warrant, and unlawfully, and without probable cause, confiscated and detained her personal property at

the police station, without a warrant, against plaintiff's will.

SEVENTH CAUSE OF ACTION

61. Paragraphs 1 through 60 are repeated and realleged as though fully set forth herein.

62. Defendants Covert and Kenny slandered the plaintiff and caused her deep mental anguish and irreparable harm to her reputation by telling people that she was a cleptomaniac [sic] who needed psychiatric help, and alleging that plaintiff's personal possessions which had been brought to the police station were "stolen goods".

EIGHTH CAUSE OF ACTION

63. Paragraphs 1 through 62 are repeated and realleged as though fully set forth herein.

64. Defendant Village of Cooperstown, personified in its duly elected officials, showed deliberate indifference to plaintiff's constitutional rights by failing to adequately train and supervise the defendant police officers in their conduct with citizens.

WHEREFORE, plaintiff Tammy E. Neighbour demands judgment against the defendants in the amount of $500,000 in compensatory damages and $250,000 in punitive damages, with interest from the 30th day of September, 1993 together with costs and disbursements of this action, including attorney's fees.

Dated: November 17, 1993

/s/ Gilbert Di Lucia
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(607) 547-7101

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TAMMY NEIGHBOUR,

Plaintiff,

-against- 93-CV-1452

MICHAEL COVERT, JOSEPH KENNY and THE VILLAGE OF COOPERSTOWN,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building and Courthouse, Utica, New York, on Tuesday, November 22, 1994 before HON. DAVID N. HURD, United States Magistrate Judge.

APPEARANCES:

FOR THE PLAINTIFF:

GILBERT DiLUCIA, ESQ.
Cooperstown, New York

FOR THE DEFENDANT:

BOHL, DELLA ROCCA & DORFMAN, PC
BY: JOSEPH MUIA, JR.
634 Madison Avenue
Albany, NY 12208

[p. 3] THE COURT: The following is the decision and order of this Court. There will be no written decision. I have reviewed all of the testimony and the exhibits last night and this morning. Officer Michael Covert of the Village of Cooperstown Police Department was investigating an alleged theft of some articles, including horse tack and equipment. He had reasonable grounds to focus his investigation upon the plaintiff. As a result, on September 30, 1993, defendants Officer Covert and Joseph Kenny approached plaintiff at her place of employment, a store in Cooperstown. Now, the plaintiff is an adult age 31. Officer Kenny was in uniform including wearing a side arm while Officer Covert was in plain clothes. The officers questioned plaintiff and requested that she relinquish a pair of boots so that a complaint in the thefts could observe and possibly identify the boots as stolen. The officer [sic] did intimidate the plaintiff by their presence and attempted to gain her cooperation by warning her about the possibility of spending two years in the state penitentiary. Plaintiff gave the boots to the officers. Officer Kenny left the store and returned shortly thereafter and advised Officer Covert that the boots were not, in fact, stolen. The officers further advised the plaintiff to come to the police station after work for additional questioning and asked her to produce additional items which were allegedly stolen. The officers then left the store. Plaintiff called her sister who brought the [p. 4] items to the police station. Defendants produced a list of items brought by the plaintiff's sister to the station which the plaintiff signed. Plaintiff also wrote and signed a, quote, voluntary statement at the insistence of the defendant officers. Defendant Kenny read plaintiffs a Miranda

right form just prior to the plaintiff leaving the station but after she had signed the, quote, voluntary statement, end quote. Plaintiff was never formally arrested or charged by the Cooperstown Police Department. The items of property belonging to the plaintiff and others were sent immediately to the State Police. Petit larceny charges were brought by the State Police which were later adjourned in contemplation of dismissal. Although plaintiff was embarrassed by the entire episode, there is no evidence that this was as [sic] a result of any untrue statements made by the defendant officers to third persons.

The plaintiff brings the following causes of action. One, unreasonable search and seizure of personal property at plaintiff's place of employment and at the police station, Fourth Amendment. Two, unlawful compulsion to produce possessions at the police station confiscating and detaining them, Fourth Amendment. Three, Failure to advise plaintiff of her right to counsel while under arrest both at her place of employment and at the police station, Sixth Amendment. Four, unlawful detainer and custody of plaintiff's person at her place of employment and at the police station without warrant, court [p. 5] order or probable cause, Sixth Amendment. Five, deprivation of plaintiff's liberty at her place of employment and the police station, Fourteenth Amendment. Six, deprivation of plaintiff's property without due process by taking property from her at her place of business without a warrant and without probable cause and confiscating her property at the police station without a warrant, Fourteenth Amendment. Seven, slander by telling people plaintiff was a cleptomaniac [sic] and alleging plaintiff's

property at police station was, quote, stolen goods. Eight, failure to adequately train defendant police officers, Village of Cooperstown. It should be noted for the slander claims these are not tort claims based upon mere negligence or assault but alleges a more serious charge of violation of constitutional rights.

The Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52. Findings of fact: One, the plaintiff is an adult female age 31 of obvious intelligence and composure. Two, although the officer did attempt to pressure and coerce her into cooperating, and she felt intimidated by their presence and pressure, her acts were those of a consenting adult. Three, legal counsel was readily available which plaintiff chose not to avail herself. Four, defendants Covert and Kenny did not search plaintiff at her place of employment on September 30, 1993. Five, defendants Covert and Kenny did not seize plaintiff nor [p. 6] take her into custody at her place of employment on September 30, 1993. Six, as an adult plaintiff voluntarily provided a pair of boots to defendants Covert and Kenny while at her place of employment. Seven, in a like manner plaintiff voluntarily went to the police station on September 30, 1993, at the request of the defendants. Eight, plaintiff requested that her sister deliver certain items of horse tack to the police station. Nine, plaintiff's sister brought certain items of horse tack to the police station at plaintiff's request. Ten, plaintiff was not in custody while she voluntarily answered questions at the police station. Eleven, plaintiff wrote and signed a voluntary statement while at the police station and thereafter. Twelve, defendant Kenny read plaintiff a Miranda statement just prior

to her leaving the police station. Thirteen, defendants Covert and Kenny investigated the alleged thefts of horse tack by asking various complainants to identify items which were among those provided by plaintiff through her sister and also sent the items to the State Police. Fourteen, defendants Covert and Kenny did not publish defamatory statements about the plaintiff to third parties. Accordingly, the Court makes the following conclusions of law:

One, the questioning of plaintiff at her place of employment and at the police station did not amount to a seizure. Therefore, plaintiff's Fourth Amendment right to be free from unreasonable seizure and search and her Fourteenth [p. 7] Amendment due process rights were not implicated. See *Oregon vs Mathiason*, 429 US 492, 494 (1977). See also *Florida versus Bostick*, 111 Supreme Court 2382, 2387-2389, where the United States Supreme Court adhered to the rule that all the circumstances of an encounter and not just a place in which the encounter occurred must be considered to decide if police conduct constituted a seizure. The Court in that case noted that the mere fact that a bus passenger did not feel free to leave the bus when encountered by narcotics officers was not dispositive when his, quote, freedom of movement was restricted by a factor independent of police conduct, i.e., by his being a passenger on a bus. *Id* at 2387.

Two, the plaintiff voluntarily provided boots and various items of horse tack to the police and voluntarily wrote and signed the statement. The defendants did not search plaintiff or any area in which she had a reasonable expectation of privacy. Although the defendants did threaten and attempt to coerce plaintiff, based upon the

totality of the circumstances the Court finds that the plaintiff acted voluntarily. See *Scheckloth vs Bustamonte*, 412 US 218, 232, 33 (1973). Therefore, plaintiff's Fourth and Fourteenth Amendment rights were not implicated. See also *Frazier v Cupp*, 394 US 731, 737-39 (1969), where the court found false statements made by the police during an interrogation insufficient to render a continuing question of violation of defendant's constitutional [p. 8] rights. As the Supreme Court stated in *Bostick*, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful. *Bostick*, 111 Supreme Court 2389.

Three, since the defendants did not arrest or charge plaintiff, her Sixth Amendment right to counsel did not attache. See *Massiah v United States*, 377 US 201, 205, 1964. Defendants did not read plaintiff her Miranda rights prior to questioning but the issue is not whether or not her statement is admissible at trial, it clearly was not, but whether plaintiff has a cause of action for the defendants failure to advise her prior to giving a statement when its admissibility was never at issue in a criminal proceeding. Requirement to notify a person of their Miranda rights is a judicial device to protect the Fourth Amendment Rights against self-incrimination and it is not a constitutional right in and of itself. As such, failure to read Miranda rights is not actionable under Section 1983. The Court notes that in advising a person of their Miranda rights is an absolute prerequisite to the prosecution's use of a self-incriminating statement obtained during custodial interrogation. See *Miranda*, 384 US 444. Any incriminating statement made prior to being advised of Miranda rights is simply not admissible against that person.

The officers and Chief of Police of the Village of Cooperstown are hereby notified that it is this Court's [p. 9] opinion that this statement by the plaintiff would never have been admissible in a criminal proceeding and it is this Court's suggestion that your interrogation procedures should be adjusted accordingly. *Id.*

In addition to everything else, the plaintiff – the defendant officers would be entitled to qualified immunity. The goal of Section 1983 is to deter public officials from violating citizen's federal rights and to compensate victims for such official wrongdoing. The doctrine of qualified immunity weighs this important interest in citizens' civil rights against the policies of encouraging qualified persons to accept public positions and ensuring that public officials vigorously discharge their duties. The balance struck under the doctrine of qualified immunity has been formulated as a rule. Public officials are immune from Section 1983 civil suits brought by an aggrieved citizen when, quote, their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, end quote. *Harlow v Fitzgerald,* 457 US 800, 818 (1982).

Further, even when the right in question was clearly established at the time of the alleged unlawful conduct, an official is still entitled to immunity objectively reasonable for him to believe the conduct lawful. See *O'Neill v Babylon,* 986 Fed 2d 626, 649, Second Circuit (1993).

The officers questioning of the plaintiff and [p. 10] obtaining items allegedly stolen did not violate any clearly established statutory or constitutional right of the

plaintiff. And even if it did so, it was objectively reasonable for them to believe – for these officers to believe they did not violate those rights. Therefore, defendants Covert and Kenny are entitled to judgment on their qualified immunity affirmative defense.

Five, the plaintiff has failed to prove each essential element of a cause of action of slander which was the pendent state law claim, *Weldy v Piedmont Airlines*, 985 Fed 2d 57, 61, Second Circuit 1993.

Six, the plaintiff has failed to prove a constitutional deprivation, therefore, even though the Village of Cooperstown is not entitled to qualified immunity, the liability of the Village is moot. See *Polk County v Dodson*, 454 US 312, 326 (1981).

For all of the above reasons, the Court orders that the complaint be dismissed in its entirety on the merits against all of the defendants.

Since the defendants are the prevailing parties, there would be some question as to whether or not they would be entitled to attorneys' fees. However, the Second Circuit recently in the case of *Rounseville vs Zahl*, decided in January 1994, issued a decision which suggests that it is highly unlikely that Section 1988 attorneys' fees will be awarded to [p. 11] the prevailing part, the defendants. The Court stressed its concern about the chilling effect of Section 1983 plaintiffs and explained that courts should award defendants fees under Section 1988 only if the plaintiff's claims were frivolous, unreasonable or groundless. Whether a party's conduct is frivolous or without foundation is a question committed to the sound discretion of the district court. This Court rules that this claim

was not frivolous, unreasonable or groundless and therefore will deny any claim for attorneys' fees. Therefore, I am directing that the clerk enter judgment dismissing the complaint.

I advise counsel that motions pursuant to Rule 50 or 59 must be filed on or before December 6, 1994. Opposing motions, opposing documents must be filed on or before December 20, 1994. The Court has no discretion to extend either one of those deadlines. Any motions post trial should be made returnable on January 12, 1995, in Utica at this court's regular motion term.

I also remind counsel that the time to appeal this decision will be 30 days from the filing of judgment or 30 days from the decision on a post-trial motion, whichever date is later.

With that we are now adjourned and I thank both counsel for their cooperation in this case.

THE CLERK: Court stands adjourned.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TAMMY E. NEIGHBOUR,

Plaintiff,

-v-

Index #93-CV-1452
(TJM-DNH)

PATROLMAN MICHAEL COVERT, PATROLMAN JOSEPH KENNY, and THE VILLAGE OF COOPERSTOWN

Defendants.

DEPOSITION OF MICHAEL CRIPPEN

On the 23rd day of March, 1994, beginning at 10:30 A.M. at the Cooperstown Village Hall, Main Street, Cooperstown, New York, before me, Claudia W. Fisher, a shorthand reporter and notary public, in and for the County of Schoharie, New York, appeared *MICHAEL CRIPPEN*, who, being by me first duly sworn, gave his oral deposition in the above entitled matter as hereinafter set forth.

APPEARANCES

REPRESENTING THE PLAINTIFF,
TAMMY E. NEIGHBOUR:

GILBERT DI LUCIA, ESQ.
Attorney at Law
10 Hoffman Lane
Cooperstown, New York 13326

REPRESENTING THE DEFENDANTS,
PLMN. COVERT and KENNY and VILLAGE
OF COOPERSTOWN:

BOHL, DELLA ROCCA & DONFMAN, P.C.
Attorneys at Law
634 Madison Avenue
Albany, New York 12208

By: JOSEPH MUIA, JR., ESQ., Of counsel

[p. 3] IT IS HEREBY STIPULATED by and between the parties hereto that the witness may be sworn by any notary public;

that the testimony may be signed before any notary public;

that the filing of this examination in the County Clerk's Office is waived;

that the filing of the referee's oath is waived;

that the plaintiffs will furnish the defendants with a copy of their examination and the defendants will furnish the plaintiffs with a copy of their examination;

that all objections except as to the form of the question will be reserved until trial.

The witness, *MICHAEL CRIPPEN*, was duly sworn by Claudia W. Fisher, notary public, and examined as follows:

BY MR. DI LUCIA:

Q Could you state your name please?

A Michael L. Crippen, C-R-I-P-P-E-N.

Q What is your occupation?

A I am a police officer for the Village of Coopers-town.

Q Your full title, are you police chief?

A I am chief of police for the Village of Coopers-town.

[p. 4] Q How long have you been chief?

A I have been chief for ten years.

Q Do you have any type of training that you put patrolmen through for conducting investigations?

A The Department does not per se, no.

Q How does a person learn this?

A For conducting interviews and I assume you are talking about Miranda they would learn that at the basic school sponsored by the State.

Q If a patrolman is conducting an investigation how does he do that, are there any guidelines here in the Department in the village?

A There are specific guidelines under Miranda as far as what they can do but I don't have any specific policy or procedures on conducting investigations.

Q If somebody makes a complaint like Mrs. Hovey did and an investigation is started, who initiates that? Do you initiate it or does the patrolman?

A The patrolman would initiate it based on the complaint whether he felt it had merit.

Q Does he check with you whether or not an investigation is warranted?

A No.

Q So there is no policy here in this village Police [p. 5] Department that when an officer decides to conduct an investigation he is not obligated to check with you, he just initiates it on his own?

MR. MUIA: I object to the relevance and ask that the question be directed to the events of this particular case.

Q In this particular case when Officer Covert initiated an investigation –

A Officer Covert didn't initiate an investigation, he responded to a complaint, he did not initiate the complaint himself.

Q No, but he initiated an investigation based on a complaint?

A Yes.

Q He did not check with you on that, it is not necessary?

A Certainly not.

Q So a patrolman can initiate an investigation on his own, it is up to his own judgment?

A Correct.

Q Without a policy of the Village to evaluate whether or not an investigation is necessary how do you safeguard the rights of your citizens?

MR. MUIA: I object, it is irrelevant and [p. 6] direct the witness not to answer.

Q Were you cognizant of the fact that Patrolman Covert was conducting an investigation?

A Yes.

Q Did you give him any instructions which would safeguard any of the people that he would be questioning during his investigation?

A I did not.

Q In other words if a patrolman decides to conduct an investigation he has a free hand to do so?

MR. MUIA: I object, the question is irrelevant and I would also ask if you can define safeguard. You mentioned safeguarding citizens, I'm not sure what that means for the record.

Q Do you take any precautions to make sure that none of your patrolmen threaten citizens in Cooperstown?

A Threaten them in general?

Q Say during an investigation.

A I am not sure exactly what kind of an answer you want or where you are going. Could you explain what you mean?

Q Do you have any kind of a procedure that your patrolmen must follow when they initiate an investigation?

A No, there is nothing in writing.

[p. 7] Q So there is nothing laid down?

A No.

Q No guidelines that are written out?

A No, I have nothing in writing.

Q So a patrolman then is free to ask any citizen in Cooperstown any question he wants in an investigation?

A Certainly.

Q So then part of that is that you don't instruct a patrolman in the type of approach he makes with citizens in terms of questioning, the type of questioning, I mean you have no basic policy here within the Village?

A Regarding questioning of suspects?

Q Yes.

A No, we don't have.

MR. MUIA: Just so the record is clear. The officers are sworn to uphold the constitution, is that correct?

THE WITNESS: That's correct.

MR. MUIA: Is there also MPTC Standards that are utilized by the village of Cooperstown?

THE WITNESS: Yes, there is.

MR. MUIA: You might want to explain that for the record because there are guideline [sic] which are set forth.

[p 8] Q What are these guidelines?

A During the State school there are specific instructions regarding interrogations, complaints, when Miranda has to be read to people, that is mandated by the State and that is done in basic police school which every officer here attends.

Q When are the Miranda rights read to somebody?

MR. MUIA: I object as being irrelevant. If you want to ask when they were read in this case if he knows I will allow it.

Q Do you know in this case when they were read?

A I do not know.

Q As to the issuance of a search warrant, do you have any kind of policy as to when your patrolmen must take out a warrant or do they rely on these rules that you are telling us about?

MR. MUIA: I object, irrelevant, I don't believe there was a search warrant in this case.

Q Do you know if there was a search warrant in this case?

A To my knowledge there was not.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

TAMMY E. NEIGHBOUR,

Plaintiff,

-versus- 93-CV-1452

MICHAEL COVERT, JOSEPH KENNY and THE VILLAGE OF COOPERSTOWN,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building, Utica, New York, on November 21, 1994, before the HON. DAVID N. HURD, United States Magistrate Judge.

APPEARANCES:

FOR THE PLAINTIFF:

GILBERT DiLUCIA, ESQ.

Cooperstown, New York

FOR THE DEFENDANT:

JOSEPH MUIA, ESQ.
Albany, New York

[p. 139] Barbara Chamberlain

CROSS-EXAMINATION BY MR. DiLUCIA:

Q. Mrs. Chamberlain, how long would you say that you've known Tammy, how many years?

A. I'm not exactly sure. I've known Jamie since she was in the third grade. I've known the family. I don't really remember when I first met Tammy. I certainly have known her since she worked in the restaurant. That has to be five years ago, maybe even longer.

Q. This was a fairly long relationship that you've had with her in one way or another. When she worked at the [p. 140] restaurant, did you have any problems with her?

A. No, I did not.

Q. How much time do you spend in your horse barns?

A. Myself personally?

Q. Yeah, personally.

A. It varies, depending on how many horses we have, what my responsibilities are, and if I have help. I generally feed morning and night.

Q. During the summer of '93, did you spend very much time in the barns?

A. I believe I did not. I don't believe we had many horses then.

Q. Your daughter Samantha?

A. Yes.

Q. Would you say she spent more time in the barns than you did?

A. Probably.

Q. It was testified by Jamie that their procedure in connection with the saddle that you lent to both Jamie and – the sister and Tammy would be to take the saddle and the saddle rack, a hook with the tack on it and a twitch, take it out on Saturday morning and bring it back on Sunday night. Were you aware of this procedure?

A. I was not aware of those specifics. I realize they pack up and take the saddle and they go and then they come [p. 141] back. I was not aware that part of the procedure was taking those items.

Q. They testified that – Jamie testified that they took these items every weekend during the summer of '93. Does that seem to be unusual to you? I mean, does it seem unusual that they did that?

A. Unusual in what way? Because they didn't ask me. It's unusual because they didn't ask, but needing the items, it's expected that you'd need the items.

Q. Now, they were paying you to board the horses. Is it true that Tammy was paying $200 a month to you?

A. It's true that they paid board for two horses, stalls, yes.

Q. Did Jamie pay separately another 200?

A. I don't believe –

Q. Or was that 200 for the two horses?

A. 200 for the two horses, that I remember correctly, which is half the normal board.

Q. Jamie testified that it was normal procedure for them to take these three small tack items. Now, what value would you put on these items? We calculate it's about, say, $15 for the items. Would you agree with something like that?

A. It's probably considerably more. The hook was a stainless steel hook. It was $30.

Q. Let's say $30. They were returning these items [p. 142] every weekend, according to their testimony. Now, basically when the police intervened, they happened to be in the possession of Tammy because it was the end of the season. Does that fit your understanding of what took place?

A. The saddle came back. It was surprising to me the rest of the things didn't come back.

Q. Who brought the saddle back to you?

A. I don't know. It was not given to me personally. It was put back.

Q. All right. Would it surprise you if I said Jamie brought the saddle back to your house?

A. No, it wouldn't surprise me. In fact, I thought I had lent the saddle to Jamie. I didn't know Tammy was using it, also.

Q. When the police said that these items were missing from your barn, did you feel that they had been stolen?

A. Yes, I did. I figured they just took them and didn't bother to bring them back.

Q. But you did not know that they were taking them every weekend –

A. No, I was not aware of that.

Q. – and bringing them back. So, basically you were not informed or you were not aware of the procedure that they were following, they were taking them out and – out every weekend during the summer?

A. [p. 143] That's correct. I didn't know it until today.

MR. DiLUCIA: No further questions.

THE COURT: Anything further?

MR. MUIA: Yes, Judge.

DIRECT EXAMINATION BY MR. MUIA:

Q. Mrs. Chamberlain, regardless of whatever procedure counsel's referring to, the fact of the matter is that those items were not returned to your barn, is that correct?

A. That's correct.

Q. And the further fact of the matter is that you reported to the Cooperstown police that those items had been taken, is that right?

A. That's correct.

Q. Okay. Presumably they acted upon your report, is that right?

A. Yes.

THE COURT: Anything further with this witness?

MR. MUIA: No, your Honor.

MR. DiLUCIA: No, your Honor.

THE COURT: Let me just ask you a couple of questions. You say you reported to the Cooperstown police. Did you report these items stolen or did the police contact you first?

THE WITNESS: The police contacted me.

* * *